...E COURT, U. S.

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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~1162~~ 9

JOHN EL STONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

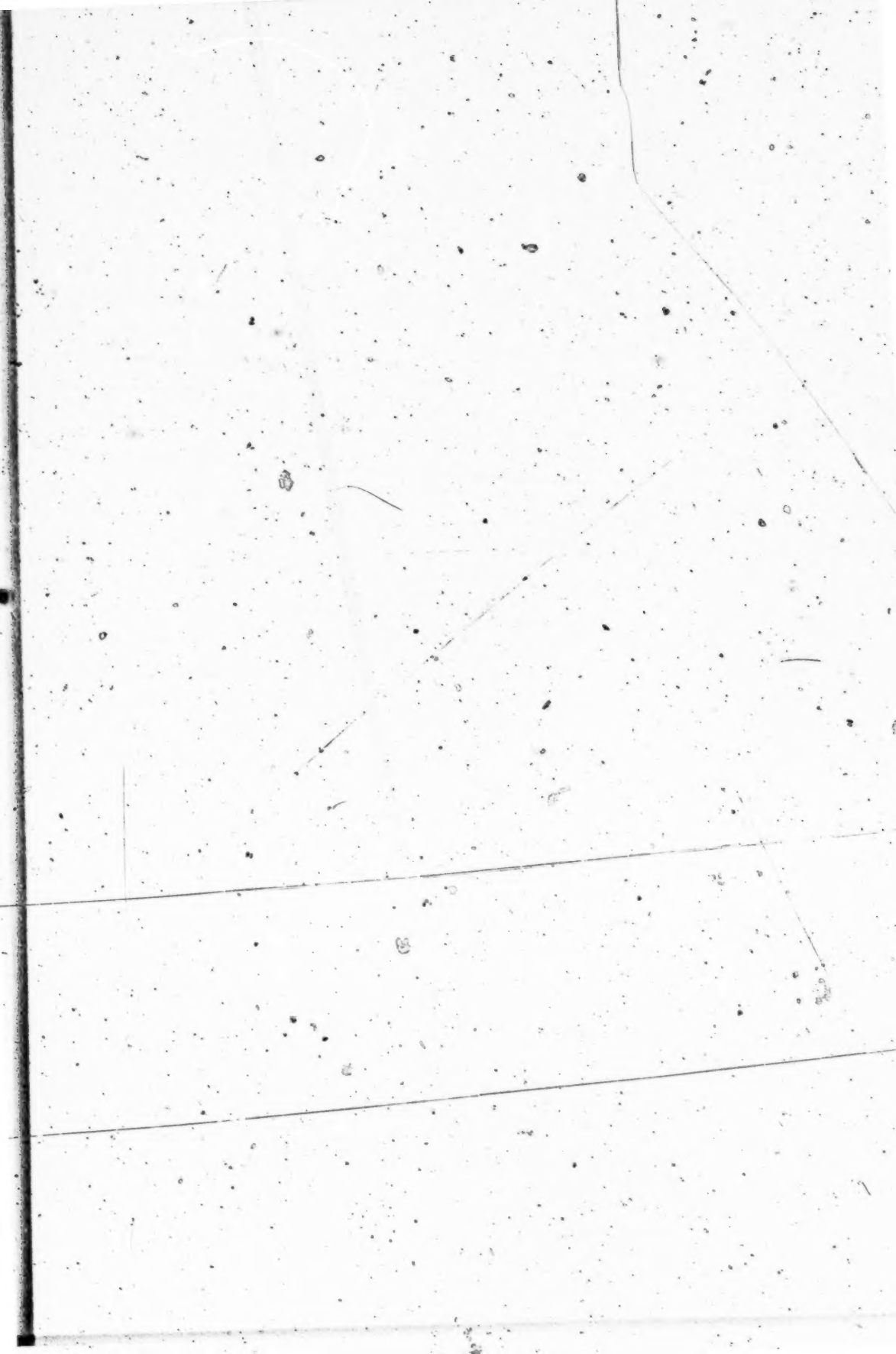
Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on March 4, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in Appendix B, is unreported at this time.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether the registration and tax provisions of the federal wagering tax laws violate Fifth and Fourteenth Amendments privileges against self-incrimination.

STATUTES INVOLVED

The statutory provisions involved are 18 U.S.C., Sections 371, 1084, 1952, 1953; 26 U.S.C., Sections 4411, 4412, 4901, 7203. They are printed in Appendix A, infra, pp. 9.

STATEMENT

Petitioner appealed from a judgment of conviction in the Federal District Court entered on six Counts of an indictment after a trial by the Court without a jury; Petitioner having waived a jury trial. Count I charged Petitioner with violating 26 U.S.C., Section 7203, by accepting wagers during the period October 1, 1962, through June 30, 1963, without having paid the special occupational tax imposed by 26 U.S.C., Section 4901. He was sentenced to 60 days in prison and fined One Thousand Dollars ($1,000.00) each on convictions under Counts IV, VII, X, XV, and XVI, the sentences of probation to run concurrently. The remainder

of the 16 Counts in the indictment were returned against Petitioner's Co-Defendants who did not appeal. Count IV charged Petitioner with the violation similar to that charged in Count I for the period October 1, 1961, through June 30, 1962. Counts VII and X charged him with violating 26 U.S.C., Section 7203, by accepting wagers during certain periods without having registered as required under 26 U.S.C., Section 4412. Count XV charged all three of the Defendants with violating 18 U.S.C., Section 371, and Section 7203, supra, by conspiring to conduct a business of accepting wagers without first paying the special occupational tax. Count XVI charged the Defendants with violating Section 7203 by failing to make excise tax returns on taxes due under 26 U.S.C., Section 4401. Counts XIII and XIV, charging Petitioner with violations of 18 U.S.C., Section 1084, were dismissed by the government as were other Counts relating solely to the Co-Defendants.

REASONS FOR GRANTING THE WRIT

Four assignments of error were projected to the Court below and the cause was affirmed, as reflected by the Court's opinion in Appendix B, infra. Only one of such issues is raised herein.

The decision of the Court below in the instant case is in conflict with the principles expressed in a controlling decision of this Court in *Albertson v. S.A.C. Board*, ... U.S.

....., 15 L. Ed. 2d 165, decided November 15, 1965. The issue as to whether or not the registration and tax provisions of the federal wagering tax laws violate Fifth Amendment privilege against self-incrimination is presently pending in this Court by petition for certiorari filed January 26, 1966, in *Moretti v. United States*, No. 951, 34 L. W. 3308, among other petitions pending.

It is Petitioner's contention that the registration and occupational tax provisions of Sections 4411 and 4412 of Title 26 U.S.C., require that he supply the United States Treasury Department with information concerning his alleged projected gambling activities and as a consequence provides a "link in a chain of evidence" to convict him under Sections 1952, 1953, and 1084, of Title 18 U.S.C., and his preparatory activities, as well as providing such evidence under Texas penal statutes concerning gambling, are in violation of his Fifth and Fourteenth Amendment privileges.

Section 4411 and the regulations filed thereunder require that Form 11-C (Appendix C) be submitted to the United States Treasury Department and that payment of the occupational tax on wagering required by Section 4411 and the registration required by said Section 4412 may tend to incriminate Petitioner of violations under 18 U.S.C., Sections 1084, 1952, 1953, and State gambling laws.

Petitioner is aware that Sections 4411 and 4412, and similar predecessor sections of the Internal Revenue Code of 1939,

have heretofore been attacked on the grounds that the registration constituted a compulsory disclosure of incriminating evidence. The validity of predecessor registration sections was upheld in *United States v. Kahriger*, 345 U.S. 22, on the theory that the Fifth Amendment would not be applied to prospective unlawful acts and that the required form was prior to the unlawful activity of the Defendant. 345 U.S. 22, at pp. 32-33. The rationale of *Kahriger* and *United States v. Sullivan*, 274 U.S. 259, was followed in *Lewis v. United States*, 348 U.S. 419. However, since the passage of 18 U.S.C., Sections 1084, 1952, and 1953, such passage places the subject registration provisions in a perspective different from that reviewed by this Court in *Lewis* and *Kahriger*. 67 Harv. L. Rev. 166 (1953). While the registration provisions on the occupational tax on wagering may not incriminate one of gambling, in which he intends to engage, it may well be a "link in a chain of evidence" to convict him of interstate travels preliminary to actual acceptance of wagers. Indeed, a Defendant who has travelled in interstate commerce with the intent of promoting a gambling enterprise and who thereafter registers pursuant to the provisions of said Sections 4411 and 4412, may well have thereby committed the overt act in furtherance of this activity required by 18 U.S.C., Section 1952(a)(3), and for all practical purposes have convicted himself thereunder. The interstate aspect when engaged in the business of wagering and betting, and its connection with past con-

duct and present status, is pointed up by the allegations of this indictment in Counts XIII and XIV under 18 U.S.C., Section 1084. Form 11-C, required by said Section 4412 is not the type of form discussed by Mr. Justice Holmes in *Sullivan*. The very act of signing this form supplies the incriminating evidence under the said Section 1952. It is the kind of form which could be filed with such answers omitted as might be incriminating to the signer.

The distinction between registration forms, part of which may be submitted with impunity and thus which in themselves may tend to incriminate, was forecast in *Communist Party v. S.A.C. Board*, 367 U.S. 1, at p. 109. A Comparison of Form 11-C and Form IS-52, which this Court was concerned with in *Albertson*, was discussed by the Court below in its opinion stating that it must be admitted that the language in *Albertson* directed to Form IS-52 does bear very closely on the problem presented in requiring gamblers to register and pay the special tax. It is the Petitioner's contention that the holding below, that *Albertson* in no way impinges upon the privilege against self-incrimination rules of *Kahriger* and *Lewis*, is incorrect and in conflict with the principles of *Albertson*. The question presented is of special importance in the administration of the Internal Revenue Code and the self-incrimination web of the anti-racketeering statutes. The gradual encroachment upon the self-incrimination rights of Petitioner through the expanded

informational form, now 11-C, and the present statutory scheme, when coupled with this Court's decision of *Malloy v. Hogan*, 378 U.S. 1, presents a factual situation not anticipated nor reviewed by this Court in *Kahriger* and Lewis.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, EMMETT COLVIN, JR., one of the attorneys for John El Stone, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ....th day of March, 1966, I served one copy of the foregoing Petition for Certiorari on the United States Attorney, B. H. Timmons, Jr., representing the Respondent, United States of America, as follows:

Honorable B. H. Timmons, Jr.
Asst. United States Attorney,
Federal Court House, Dallas, Texas,

by mailing a copy in a duly addressed envelope, postage prepaid, to the above party at the address so indicated.

.....

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APPENDIX A

STATUTES INVOLVED

Title 26, U.S.C.A., Section 4401; Imposition of tax

(a) Wagers—There shall be imposed on wagers, as defined in Section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

Title 26, U.S.C.A., Section 4411; Imposition of Tax

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

Title 26, U.S.C.A., Section 4412; Registration

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

Title 26, U.S.C.A., Section 4901; Payment of tax

(a) Condition precedent to carrying on certain business. —No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wager-

ing), 4461(2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marhuana) until he has paid the special tax therefor.

(b) Computation.—All special taxes shall be imposed as of on the first day of July in each year, or on commencing former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) How paid.—

(1) Stamp.—All special taxes imposed by law shall be paid by stamps denoting the tax.

(2) Assessment.—For authority of the Secretary or his delegate to make assessments where the special taxes have not been duly paid by stamp at the time and in the manner provided by law, see subtitle F.

Title 26, U.S.C.A., Section 7203; Wilful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who wilfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misde-

meanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Title 18, U.S.C.A., 371; Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to affect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, U.S.C.A., Section 1084; Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

Title 18, U.S.C.A., Section 1952; Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in sub-paragraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Title 18, U.S.C.A., Section 1953; Interstate transportation of wagering paraphernalia

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel material used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.